

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

THE UNITED STATES OF AMERICA, ) Case No. 8:13CR108  
)  
Plaintiff, )  
)  
vs. )  
)  
KIRK COTTOM, )  
) Omaha, Nebraska  
Defendant. ) July 27, 2015

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOSEPH F. BATAILLON  
UNITED STATES SENIOR DISTRICT JUDGE

A-P-P-E-A-R-A-N-C-E-S

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Proceedings recorded by mechanical stenography, transcript  
produced with computer.

1 (At 9:49 a.m. on July 27, 2015; with counsel present;  
2 WITHOUT the defendant:)

3 THE COURT: Please be seated.

4 All right. This is the case of the United States of  
5 America versus Kirk Cotton, Case No. 13CR108.

6 Would the attorneys please enter their appearance for the  
7 record.

8 MR. BECKER: Keith Becker for the United States.  
9 Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. NORRIS: Good morning, Your Honor. For the  
12 United States, Michael Norris.

13 MR. HOWARD: Good morning, Your Honor. Joseph L.  
14 Howard on behalf of Mr. Kirk Cotton, who's not present this  
15 morning. I will waive his appearance.

16 THE COURT: All right. And we're just talking about  
17 preliminary scheduling matters and some other discovery issues,  
18 so I don't know that his presence is necessary.

19 So I asked -- I asked last week for you to come back and  
20 talk to me about how and when we could handle the hearing  
21 preceding Mr. Cotton's trial. So who wants to speak for the  
22 government?

23 MR. BECKER: Judge, I think the bottom line is that  
24 we can go forward with that hearing on August 3rd, which was  
25 scheduled to be our first trial day.

1 THE COURT: Okay. And you would call -- you plan to  
2 call whom or what?

3 MR. BECKER: I don't know about "what."

4 THE COURT: Yeah.

5 MR. BECKER: We plan to call Special Agent Steven A.  
6 Smith, Jr.

7 THE COURT: Okay.

8 MR. BECKER: The FBI contractor --

9 THE COURT: Okay.

10 MR. BECKER: -- who is available. No longer working  
11 for the FBI, works for a private company, but he is available  
12 and we've talked to him and confirmed that.

13 THE COURT: Okay.

14 MR. BECKER: Supervisory Special Agent Michael  
15 Pilapil.

16 THE COURT: Okay.

17 MR. BECKER: And possibly one other additional FBI  
18 employee named John Solano.

19 THE COURT: Okay.

20 MR. BECKER: Not sure whether he'll -- his testimony  
21 will be necessary or not but will be prepared to.

22 THE COURT: Okay.

23 MR. BECKER: They're all available.

24 THE COURT: All right. And, Mr. Howard, how about  
25 you? Will you have a witness available if necessary?

1 MR. HOWARD: I have talked to Matt Miller, who is our  
2 expert. He is available --

3 THE COURT: Okay.

4 MR. HOWARD: -- that Monday morning. However --

5 THE COURT: Go ahead.

6 MR. HOWARD: I'm not trying to muddy the waters, but  
7 this is all happening in real-time.

8 I just received a very lengthy email from my client  
9 alleging that aspects of the NIT are fraudulent based on the  
10 information that we obtained last week from Matt Miller's  
11 review of some of the intricacies of the NIT.

12 And I'm only telling you this, Your Honor, because I  
13 then took that email from my client and I forwarded it to  
14 Mr. Miller, Dr. Miller, for his review to determine whether or  
15 not there's anything of substance to the allegations of fraud  
16 in the NIT.

17 THE COURT: Correct.

18 MR. HOWARD: So upon his return to me with an answer  
19 as to whether there's anything to this, I may or may not be  
20 filing an additional motion to suppress.

21 THE COURT: Okay.

22 MR. HOWARD: I just wanted to make you aware of that  
23 for -- for obvious reasons.

24 THE COURT: No, I understand. But -- but I don't --  
25 I don't want to get -- I don't want -- I don't want this sprung

1 on me on Monday, okay? So we've got the whole week between now  
2 and Monday.

3 So I -- I mean, from a real-time standpoint, I'd like to  
4 know by Wednesday if there's going to be any additional  
5 motions. Is that a timeline you could work with?

6 MR. HOWARD: It's going to -- I'm going to make it  
7 work, yes.

8 THE COURT: All right. So you have -- you have until  
9 Wednesday to tell me whether there's something additional you  
10 want me to consider --

11 MR. HOWARD: Thank you, sir.

12 THE COURT: -- so that the government will have time  
13 to respond and I'll have time to respond.

14 But be that as it may, we're going to start on Monday  
15 morning with this hearing.

16 The question then is whether we pick the jury on Tuesday  
17 or try to still do it on Monday. So does the government have a  
18 preference?

19 MR. BECKER: Judge, I think probably -- I think it's  
20 probably going to make a -- make sense to pick the jury on  
21 Tuesday and just let us deal with pretrial hearings on Monday.  
22 That may also mean that whatever Mr. Cottom may try to file or  
23 not file in terms of a suppression motion or whatever it's  
24 going to be styled at, we may be able to deal with on Monday as  
25 well.

1 THE COURT: Okay.

2 MR. BECKER: And just save that as a motions day and  
3 go forward with the jury on Tuesday.

4 THE COURT: On Tuesday.

5 MR. BECKER: I think we -- we want to try to keep the  
6 trial schedule. You know, we're three years into this  
7 investigation and prosecution. We're definitely interested in  
8 getting this case resolved on the current schedule.

9 THE COURT: All right. Mr. Howard, do you have any  
10 objection to that, at least today?

11 MR. HOWARD: No, sir. No.

12 THE COURT: Okay. So we'll start then Monday  
13 morning. Let's give my staff a little break and say nine  
14 o'clock. And then we'll -- we'll keep the balance of the day  
15 for any pretrial matters and then pick the jury on -- plan to  
16 pick the jury on Tuesday morning at nine.

17 So I have -- I have one other issue with respect to jury  
18 instructions that I want to take up with you, but first I'm  
19 going to ask if either of you have any other issues with  
20 respect to Mr. Cottom that we need to take up?

21 Mr. Becker?

22 MR. BECKER: Not from us, Your Honor.

23 THE COURT: Mr. Howard?

24 MR. HOWARD: We're having conferences right now about  
25 whether or not we can do a bench trial on this, and we'll keep

1       you informed as to how that conversation unfolds.

2               THE COURT: Let me know. But let's -- so let's talk  
3 about jury instructions, okay?

4               So I sent you a set of jury instructions for Tidwell, both  
5 of you -- or all three of you. I think that this case is  
6 exactly the same as Cottom's. In other words, Tid- -- I got it  
7 backwards for the record. Cottom's case is exactly the same as  
8 Tidwell's as far as how it's charged. Is that correct,  
9 Mr. Becker?

10              MR. BECKER: That's correct right now. We're in --  
11 we're having conversations about whether Mr. Cottom is  
12 interested in consolidating his Western District of New York  
13 charges --

14              THE COURT: Oh, okay.

15              MR. BECKER: -- in a single trial. Don't know where  
16 those conversations are going to go. That would mean some  
17 additional charges, although the same --

18              THE COURT: Same --

19              MR. BECKER: -- same bucket of charges.

20              THE COURT: Right.

21              MR. BECKER: The charges in Western District of  
22 New York are receipt, access and possession.

23              THE COURT: Same as here.

24              MR. BECKER: Here is receipt and access.

25              THE COURT: Oh, but not --

1 MR. BECKER: Not possession.

2 THE COURT: Not possession.

3 MR. BECKER: There's no venue for possession in  
4 Nebraska.

5 THE COURT: Well, the problem that I had with the  
6 last case I tried was the attempt --

7 MR. BECKER: Right.

8 THE COURT: -- okay? And we're still in the  
9 process, I -- I haven't approved the order on that yet, but  
10 it creates huge conceptual problems for me. And I think I  
11 made a mistake in the way I -- I -- I let -- let that proceed.  
12 I don't know that it makes any difference on the outcome, but  
13 it's -- I think it creates some conceptual -- legal conceptual  
14 problems.

15 So if you -- if you read my instructions, which you might  
16 not have done because you knew the case was going to settle on  
17 Friday --

18 MR. BECKER: We did.

19 MR. NORRIS: We read them.

20 THE COURT: Okay. You'll see that we're going to  
21 instruct on attempt but the jury instruction is going to be  
22 if they find receipt or possession, that they're not going to  
23 then decide on the attempt. So there's no lesser-included  
24 unless there's some special facts during the trial that get  
25 you the lesser-included. Because I'm concerned conceptually



1 about how that works and how jeopardy attaches on those  
2 issues.

3 So I intend to instruct the same way on Cottom as I have  
4 proposed to instruct on Tidwell.

5 So if you -- if you gentlemen have a problem with it,  
6 I'd at least like to talk about it, either now or certainly  
7 later on.

8 MR. BECKER: We can talk about it -- from our side,  
9 we can talk about it now, Judge. I don't think we have any  
10 objection to the "if you find guilty of receipt, do not  
11 deliberate on the theory of attempted receipt."

12 THE COURT: Correct.

13 MR. BECKER: I think the way we were reading this  
14 version of the jury instructions though, it seemed as though it  
15 was also "if you find guilty on receipt, do not deliberate on  
16 access with intent to view." We don't think that would be  
17 either --

18 THE COURT: Okay.

19 MR. BECKER: -- that would be appropriate. You know,  
20 they -- they passed the *Blockburger* test in terms of having  
21 different elements, and so we would still want a -- to find --  
22 even if you find receipt, still move on to Count II, access  
23 with intent to view, and then --

24 THE COURT: So you don't think --

25 MR. BECKER: No need to go from that to an attempt

1 theory on access with intent.

2 THE COURT: Okay. Well, that solves the biggest  
3 conceptual problem that I have.

4 MR. BECKER: Agreed.

5 THE COURT: And access with intent to view, why is  
6 that different than -- than receipt?

7 MR. BECKER: The elements differ and so from a  
8 *Blockburger* -- *Blockburger* sense, they are -- there's  
9 not -- it's not a lesser-included because of the differing  
10 elements.

11 THE COURT: Do you have different dates? You  
12 don't have different dates though but you might have  
13 different events that occur -- or that coincide with each  
14 of those charges?

15 MR. BECKER: Right. We don't have different dates.  
16 I think the way that we've argued it in the prior trials has  
17 been that the access with intent, you know, the proof of that  
18 is the access to the website; it's the website itself.

19 THE COURT: Oh, I see.

20 MR. BECKER: The receipt counts have to do with the  
21 particular images that are downloaded during a particular  
22 session.

23 THE COURT: So you'd have to prove that the defendant  
24 accessed the website on the dates alleged?

25 MR. BECKER: Yeah.

1 THE COURT: Okay. And that's the difference  
2 between -- so it might be receipt but it's also viewing with  
3 intent?

4 MR. BECKER: (Nodded affirmatively.)

5 THE COURT: And that's your position?

6 MR. BECKER: Yes.

7 THE COURT: All right. Mr. Howard, do you have any  
8 questions about that?

9 MR. HOWARD: No. And, unfortunately, that makes  
10 sense.

11 THE COURT: It makes sense to me.

12 MR. HOWARD: Yeah.

13 THE COURT: But it made sense to me the last time I  
14 instructed on both attempt and receipt so -- sometimes I'm  
15 easily deluded.

16 Okay. So I'll -- we'll -- I'll check the instructions to  
17 make sure we don't have a problem as far as viewing with  
18 intent.

19 Is there anything else that the government wants to take  
20 up at this time?

21 MR. BECKER: Not at this time, Your Honor.

22 THE COURT: Mr. Howard?

23 MR. HOWARD: No. Thank you very much, sir.

24 THE COURT: All right. So we'll see you then on  
25 Monday at nine o'clock.

1 MR. BECKER: Okay.

2 THE COURT: We're adjourned.

3 (Recess at 10:00 a.m.)

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19 C E R T I F I C A T I O N

20 I, Susan M. DeVetter, RDR, CRR, certify that the foregoing  
21 is a correct transcript from the record of proceedings in the  
22 above-entitled matter.

23

24 /s/ Susan M. DeVetter  
Official Court Reporter

January 20, 2016  
Date

25